

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP

A NEW YORK LIMITED LIABILITY PARTNERSHIP

THE McPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100
WASHINGTON, D.C. 20005-2327

(202) 682-3500
Fax (202) 682-3580

NINE QUEEN'S ROAD CENTRAL
HONG KONG
852-2845-8989
FAX 852-2845-3682

425 PARK AVENUE
NEW YORK, NY 10022-3598
(212) 836-8000
FAX (212) 836-8689

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067-6048
(310) 788-1000
FAX (310) 788-1200

IRVING GASTFREUND
(202) 682-3526

Internet E-Mail Address
irvg@ix.netcom.com

May 28, 1996

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MAY 28 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Re: Television Station WTWB-TV, Channel 19,
Johnstown, Pennsylvania
Petition For Rulemaking
Amendment of Table of Television Allotments
(Johnstown and Jeannette, Pennsylvania)
(RM No. ____, MM Docket No. ____)

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Venture Technologies Group, Inc., licensee of Television Station WTWB-TV, Channel 19, Johnstown, Pennsylvania are an original and four copies of its Petition For Reconsideration with respect to the April 25, 1996, ruling by the Chief of the Allocations Branch of the Mass Media Bureau's Policy and Rules Division dismissing as unacceptable VTG's January 31, 1996 Petition For Rulemaking which seeks modification of the Commission's Table of TV Channel Allotments to (a) delete UHF Channel 19 from Johnstown, Pennsylvania; (b) add UHF Channel 19 to Jeannette, Pennsylvania; and (c) modify the license of WTWB-TV to specify operations on Channel 19 in Jeannette, Pennsylvania in lieu of operation on Channel 19 in Johnstown, Pennsylvania.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP

Mr. William F. Caton

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Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER, LLP

By: _____


Irving Gastfreund

Enclosures

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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MAY 28 1996

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Amendment of Section 73.606(b)) RM No. _____
of the Commission's Rules) MM Docket No. _____
Table of Allotments)
For Television Broadcast Stations)
(Johnstown and Jeannette, Pennsylvania))

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Irving Gastfreund, Esq.

Kaye, Scholer, Fierman, Hays & Handler, LLP
901 15th Street, NW
Suite 1100
Washington, D.C. 20005

Counsel to Venture Technologies Group, Inc.

May 28, 1996

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Summary

The April 25, 1996 Staff Ruling in this case violates established Commission policies. The Staff Ruling erroneously holds that the January 31, 1996 Petition For Rulemaking of Venture Technologies Group, Inc. ("VTG") is unacceptable for filing because, allegedly, it violates the Commission's Advanced Televisions ("ATV") Freeze Order. Acceptance and grant of VTG's proposal would be fully consistent with the Freeze Order and would not in any way hamper the Commission's flexibility in making ATV channel assignments.

As shown herein, the Staff Ruling improperly relied on the staff decision in Appleton, New London and Suring, Wisconsin, 10 FCC Rcd 7712 (Allocations Branch, 1995), since the facts in that case were distinguishable from those presented herein. In Appleton, the licensee proposed a transmitter site relocation significantly closer to the Milwaukee reference point and freeze area, whereas VTG proposes no site relocation or modification of technical facilities. In addition, the licensee in Appleton proposed the creation of a gray area, whereas no loss area would be created by VTG's proposal.

The Staff Ruling improperly held that VTG was required to establish the existence of "compelling" reasons why the public interest would be served by the proposed change in WTWB-TV's community of license. Established Commission policy does not require that VTG's Petition For Rulemaking be assessed under such an exacting standard of review. Nonetheless, as shown herein, VTG has established compelling public interest justification for its proposed change in WTWB-TV's community of license.

As shown herein, grant of VTG's proposed community of license change would result in a preferential arrangement of television channel allotments, since reallocation of Channel 19 to Jeannette would be entitled to a first local service preference. There is no basis whatsoever for refusing to grant such a preference since, as shown herein, the City of Jeannette is not interdependent with Pittsburgh and since no other factors exist which warrant denial of a first local service preference. Moreover, in assessing the public interest benefits to be gained by the proposed change in WTWB-TV's community of license, the Allocations Branch, in its Staff Ruling, improperly refused to consider the survivability of WTWB-TV as a viable over-the-air broadcast service if the proposed community of license change is not adopted by the Commission. The refusal by the Allocations Branch to consider the factor of WTWB-TV's ability to remain viable as a broadcast service was contrary to established Commission precedent.

WASHINGTON, D.C. 20554

To: Chief, Mass Media Bureau

Doc #12135951.DC

transmitter site and with the very same technical facilities with which the station is presently authorized.²

VTG's Petition For Rulemaking sets forth information demonstrating the historical difficulties of the successive licensees of the television station operating on Channel 19 in Johnstown, Pennsylvania, including successive bankruptcies and extended off-air periods by different licensees of the station. The Petition seeks the change in community of license without any other associated technical changes in order to assure the continued viability of operation by any station on Channel 19 in the Johnstown, Pennsylvania, area, thereby assuring continued service to the public.

Quite simply, the change of community of license will have the effect of ensuring that WTWB-TV's signal will be entitled to be considered as a qualified signal for purposes of the Commission's cable television "must carry" rules on cable systems in the Pittsburgh, Pennsylvania, Area of Dominant Influence ("ADI") and in the Pittsburgh Designated Market Area ("DMA"). Cable television penetration in the Pittsburgh, Pennsylvania, market is quite high. According to Warren Publishing's Cable & Station Coverage Atlas (1995), 76 percent of the television households in the Pittsburgh DMA are cable subscribers, and the Pittsburgh DMA ranks as the 18th largest market in terms of cable television penetration in the United States (i.e., cable television households as a percentage of all television households in the market). Id. at 15.

² WTWB-TV's authorized transmitter site is at the AT&T Tower Site, Route 30, RR #2, Boswell, Somerset County, Pennsylvania, at the following coordinates: 40° 10' 51" North Latitude, 79° 09' 46" West Longitude. See BMPCT-960119KF. That authorization specifies a maximum effective radiated power of 3,020 kW at an antenna height (of radiation center) of 113 meters Above Ground Level, and 936 meters Above Mean Sea Level. That authorization permits the height of the WTWB antenna radiation center to be 325 meters above average terrain. Id.

These facts make it imperative that, for any station on Channel 19 to be capable of remaining on the air as a UHF station and providing over-the-air service to the residents of the area, the station must be capable of attaining qualification for must-carry status in the Pittsburgh ADI and Pittsburgh DMA. The proposed change of WTWB-TV's community of license from Johnstown to Jeannette, Pennsylvania, would result in such qualification, since Johnstown is located in Cambria County, Pennsylvania (which is located outside of the counties which are part of the Pittsburgh DMA), while Jeannette is located in Westmoreland County, Pennsylvania (which is a county that is part of the Pittsburgh DMA, as defined by A.C. Nielsen Company). See Broadcasting & Cable Yearbook (1996) at C-212. Moreover, Cambria County, Pennsylvania, is located outside of the counties which are part of the Pittsburgh ADI (as defined by The Arbitron Company), while Westmoreland County, Pennsylvania (in which Jeannette is located) is a county that is part of the Pittsburgh ADI as defined by Arbitron. See Broadcasting & Cable Yearbook (1993) at C-188.

In its Staff Ruling herein, the Allocations Branch dismissed VTG's Petition For Rulemaking as unacceptable for filing. In this regard, the Staff Ruling held that VTG's Petition violates the Commission's Advanced Television ("ATV") Freeze Order³. In addition, the Staff Ruling held, without support, that VTG had failed to provide a "compelling showing" that the public interest would be served by reallocating Channel 19 from Johnstown to Jeanette. In this connection, the Staff Ruling noted that WTWB-TV could provide service to the Pittsburgh area from the station's present transmitter site. Furthermore, the Staff Ruling held that VTG had not

³ Advanced Television Systems And Their Impact On The Existing Television Broadcasting Service, __ FCC Rcd __, Mimeo 4074 (released July 17, 1987), 52 Fed. Reg. 28346 (July 29, 1987).

made any showing that there were unique broadcast needs that the residents of Jeannette were not now receiving. In addition, the Staff Ruling held that there is no provision in the Commission's decision adopting the change of community rules⁴ for allegations of unique hardship to be considered in determining whether a proposed reallocation would result in a preferential arrangement of allocations. Staff Ruling, slip op. at 2.

For the reasons set forth below, the Staff Ruling is contrary to established Commission precedent and contrary to sound public policy and the paramount public interest. The Staff Ruling is therefore arbitrary and capricious and should be expeditiously reconsidered and vacated, and, on reconsideration, the Policy and Rules Division of the Mass Media Bureau should expeditiously issue a Notice of Proposed Rulemaking proposing to reallocate Channel 19 from Johnstown to Jeannette, Pennsylvania, as requested by VTG.

II. Argument

A. Acceptance and Grant of VTG's Petition For Rulemaking and Reallocation of Channel 19 From Johnstown to Jeannette, Pennsylvania Will Not Violate the Commission's ATV Freeze Order or Otherwise Adversely Affect ATV Channel Allotments

In its ATV Freeze Order, supra, the Commission stated as follows:

"Accordingly, we will temporarily freeze the TV Table of Allotments in certain areas ... The affected areas are those circumscribed by the minimum co-channel separation distances specified in Section 73.610(b) of the Rules, from the reference points as given in Section 76.53 for the cities listed in the appendix [to this Order].... No petitions to amend the table will be accepted for these areas. Further, construction permit applications for vacant television allocations in these areas will not be accepted. This freeze, however, will not apply to changes requested by existing stations.... The Commission will also consider waiver requests on a case-by-case basis for non-commercial educational channels or for

⁴ Modification of FM and TV Authorizations To Specify A New Community Of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

applicants which provide compelling reasons why this freeze should not apply to their particular situations or class of stations. [Emphasis added.]”

Id., slip op. at 2.

Plainly, VTG’s Petition For Rulemaking falls within the “changes to existing stations” exception to the ATV Freeze Order. VTG’s Petition For Rulemaking can thus be processed and rulemaking proceedings instituted notwithstanding the ATV Freeze Order. In this regard, VTG is not seeking the allotment of a new television channel; rather, VTG is merely seeking the reassignment of an existing television station’s designated community of license. Similarly, VTG is not seeking any modification in the currently authorized technical facilities of WTWB-TV, as specified in BMPCT-960119KF; if the proposed reallocation of Channel 19 from Johnstown to Jeannette, Pennsylvania, is effectuated by the Commission, WTWB-TV’s transmitter will remain at the transmitter site authorized in that instrument of authorization and with the same effective radiated power and antenna height as specified in that instrument or authorization.

Annexed hereto as Exhibit 1 is the Declaration of Lawrence H. Rogow, President of VTG, who certifies to the foregoing and states that VTG will not relocate WTWB-TV’s transmitter site any closer toward Pittsburgh if Channel 19 is reassigned from Johnstown to Jeannette. In this regard, annexed as Attachment 1 to Mr. Rogow’s Declaration is the Engineering Statement of Donald S. Wilson, VTG’s Director of Engineering. As is shown in that Engineering Statement and as is noted by Mr. Rogow in his annexed Declaration, given the constraints of the Commission’s channel spacing rules and the UHF “taboos”, it would not even theoretically be possible to move the WTWB-TV transmitter any more than 3.8 miles (6.1 km) in the direction of Pittsburgh from the transmitter site specified in BMPCT-960119KF.

Moreover, Mr. Rogow and Mr. Wilson note that, even though it is theoretically possible to move the WTWB-TV transmitter site by 3.8 miles in the direction of Pittsburgh, VTG would not seek any such relocation in the direction of Pittsburgh. Such relocation would not be pragmatically feasible, since any relocation of the WTWB-TV transmitter site in the direction of Pittsburgh would be to a lower elevation transmitter site, thereby severely constricting the station's signal coverage of Jeannette and Johnstown. Indeed, such relocation to the theoretically closest point possible to Pittsburgh, consistent with the Commission's technical rules, would result in an inability by WTWB-TV to place a city-grade signal over Jeannette, Pennsylvania. Furthermore, as noted by Mr. Wilson and Mr. Rogow, signal coverage by WTWB-TV into Pittsburgh from the presently authorized transmitter site for the station (as specified in BMPCT-960119KF), is actually far less intense than Grade B quality (and in any event for less than Grade A or city-grade), even though the station places a theoretically predicted Grade B signal over Pittsburgh from that site⁵. Mr. Rogow and Mr. Wilson note in their annexed declarations that to achieve even this same degree of coverage over Pittsburgh from a new transmitter site located closer to Pittsburgh, WTWB-TV would have to be transmitting with a transmitting antenna height which would be so tall as to make it highly unlikely that the requisite approvals for the tall tower could be obtained from both the Federal Aviation Administration and from local zoning and other local governmental authorities. Id.

Based on the foregoing, Mr. Rogow affirms in his annexed Declaration that VTG will not seek to relocate the WTWB-TV Channel 19 transmitter site in the direction of Pittsburgh, since, as shown above, any such site change would be counterproductive for the station in terms of

⁵ Thus, the Staff Ruling was in error in its conclusion that WTWB-TV could adequately serve the Pittsburgh area from the station's present transmitter site.

signal coverage, since the WTWB-TV transmitter site specified in BMPCT-960119KF is situated at a height above average terrain which is higher than the elevation of any other site to which the station could theoretically move in the direction of Pittsburgh. Thus, VTG has no reason to relocate the WTWB-TV transmitter site to a lower antenna height simply to gain a slight distance of no more than 3.8 miles in the direction of Pittsburgh, especially since the authorized WTWB-TV transmitter site as specified in BMPCT-960119KF is located approximately 49.3 miles away from the Pittsburgh reference point. See Exhibit 1, infra, at ¶6; at Attachment 1. (Declaration of Lawrence H. Rogow and Engineering Statement of Donald S. Wilson).

The ATV Freeze Order states that the purpose of the freeze was to “preserve spectrum flexibility” so as not to “unduly restrict possibilities for providing additional spectrum for advanced television”. ATV Freeze Order, slip op. At 2. The acceptance of VTG’s Petition For Rulemaking and grant of that Petition and adoption by the Commission of VTG’s proposed changes to the Table of Television Allotments will have no adverse effect whatsoever on preservation of spectrum flexibility by the Commission in the ATV proceeding. As noted above and in the annexed Declaration of Lawrence H. Rogow, regardless of whether the Commission adopts VTG’s proposed change in the Table of Television Allotments, barring unforeseen circumstances such as loss of availability of the transmitter site, WTWB-TV will broadcast from a transmitter site at the AT&T tower site on Route 30, RR#2, Boswell, Somerset County, Pennsylvania, with the technical parameters specified in BMPCT-960119KF on a going-forward basis. As shown above, the purpose of VTG’s Petition For Rulemaking is merely to assure that WTWB-TV continues to remain on the air as a viable broadcast service to the public, as the result of assuring qualification for must-carry status in the Pittsburgh ADI. Such a change in

WTWB-TV's community of license with no concomitant changes in the technical facilities of WTWB-TV will have absolutely no adverse effect whatsoever on the Commission's ability to allocate spectrum to advanced television systems. In short, acceptance by the Commission of the VTG Petition For Rulemaking and grant of that Petition would be fully consistent with the express language and intent of the Commission's ATV Freeze Order, supra.

The only legitimate concern for the Commission in relation to the ATV Freeze Order is to maintain spectrum flexibility, and, as shown above, established Commission policy recognizes that these concerns are not implicated where, as here, a proposed change in community of license is not accompanied by any changes in the technical facilities of transmitter site of the station in question. There is simply no Commission decision of which VTG is aware which stands for the proposition that the ATV Freeze Order precludes acceptance of and action on a petition for rulemaking to change the community of license of an existing television station where, as here, no change in the station's transmitter site or to the technical facilities is proposed by the licensee.

For all these reasons, the Staff Ruling herein is inconsistent with the established Commission policy regarding the scope of the exception in the ATV Freeze Order for "changes to existing stations".

The Staff Ruling in this case is inconsistent with the language of the Commission's Freeze Order itself, which specifically states that the freeze "... will not apply to changes requested by existing stations". As noted above, the "changes" contemplated by the Freeze Order specifically included changes in the Table of Allotments for existing television stations. ATV Freeze Order, supra, slip op. at 1. There is simply no basis whatsoever in the Commission's ATV Freeze Order for the interpretation of the Allocations Branch, in its Staff

Ruling that the “changes to existing stations” exception to the freeze covered only construction permit applications, but not petitions to amend the Table of Allotments with respect to existing stations, where, as here, no transmitter site relocations or other technical changes are proposed..

The Staff Ruling is also inconsistent with the action by the Chief of the Mass Media Bureau in Ardmore, Oklahoma and Sherman, Texas, 6 FCC Rcd 7006 (Mass Media Bureau, 1991) (Notice of Proposed Rulemaking); and inconsistent with action by the full Commission itself in Ardmore, Oklahoma and Sherman, Texas, 7 FCC Rcd 4846 (1992) (Report and Order). In the Ardmore case, the licensee of Television Station KXII(TV), Channel 12, Ardmore, Oklahoma, filed a Petition For Rulemaking seeking the reallocation of Channel 12 from Ardmore, Oklahoma to Sherman, Texas, and the modification of the station’s license accordingly. In that case, as here, no change in technical facilities of the station was proposed or contemplated. Yet, in a staff ruling dated February 1, 1990, the Allocations Branch of the Mass Media Bureau’s Policy and Rules Division dismissed the KXII(TV) petition for rulemaking as unacceptable. In so holding, the Allocations Branch noted the pending ATV freeze and noted that Ardmore is within the “freeze zone” of the Dallas-Ft Worth, Texas television market. The Allocations Branch also noted that the KXII(TV) proposal would remove Ardmore’s only local television transmission service. The licensee of KXII(TV) filed an application for review from the staff ruling and noted that the ATV Freeze Order did not preclude favorable action on its rulemaking petition. In Ardmore, Oklahoma and Sherman, Texas, 6 FCC Rcd 7006 (Mass Media Bureau, 1991), the Chief of the Mass Media Bureau issued a Notice of Proposed Rulemaking proposing the change in community of license proposed by KXII(TV), thereby reversing the staff ruling by the Chief of the Allocations Branch to dismiss the KXII(TV)

rulemaking petition; the Notice of Proposed Rulemaking in the Ardmore case was issued notwithstanding the Commission's ATV Freeze Order. See 6 FCC Rcd 7006 n. 2.⁶ Indeed, in Ardmore, Oklahoma and Sherman, Texas, 7 FCC Rcd 4846 (1992), the full Commission granted the channel allotment change (community of license change) requested by KXII(TV) notwithstanding the ATV Freeze Order. See, 7 FCC Rcd 4846. Importantly, in the Ardmore/Sherman case, as here, there was to be no transmitter site move accompanying the proposed change in community of license.

In an effort to support its conclusion that acceptance of VTG's Petition would violate the ATV Freeze Order, the Staff Ruling in this case relies on the July 17, 1995 ruling by the Allocations Branch in Appleton, New London and Suring, Wisconsin, 10 FCC Rcd 7712 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1995.) However, the Appleton case is distinguishable on its facts from the facts presented in this case. In Appleton, a licensee proposed a change of community of license for a television station, as well as a relocation of the television station's transmitter site closer to an ATV freeze area. The licensee proposed to relocate the station's transmitter site from a point 137 miles from Milwaukee to a point located either at 102.5 miles from Milwaukee or to a point located 98.8 miles from Milwaukee. See Appleton, New London and Suring, Wisconsin, 8 FCC Rcd 181, 182 at ¶8 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1993); Appleton, New London and Suring, Wisconsin, 10 FCC Rcd 7712 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, 1995). In addition, in Appleton, the licensee's proposal would

⁶ In issuing the Notice of Proposed Rulemaking in the Ardmore/Sherman case, the Chief of the Mass Media Bureau dismissed as moot KXII(TV)'s Application For Review from the staff dismissal of its petition for rulemaking. Id., 6 FCC Rcd at 7006 n.1.

have created a “gray area” with a population of 776 persons and an area of 140 persons and would have resulted in removal of Suring, Wisconsin’s sole television station. 8 FCC Rcd at 182. Clearly, these facts are distinguishable from those presented in this case where VTG proposes absolutely no modification to the technical facilities of WTWB.

Thus, it is clear that well-established Commission policy is that the exception in the ATV Freeze Order for changes to existing stations covers not only applications for modification of existing stations, but also petitions for rulemaking to modify community of license for existing stations, whereas, as here, a licensee proposes merely a change in community of license but without any accompanying site relocation closer to the center of an ATV freeze zone.

B. The Staff Ruling In This Case Erroneously Held That VTG Was Required To Provide a “Compelling” Showing That The Public Interest Would Be Served By Grant Of VTG’s Request

In its Staff Ruling herein, the Allocations Branch held as follows:

“Even if we were to find that the exception [to the ATV Freeze Order for changes to existing stations] included rule making petitions to change a station’s community of license, we find that you have failed to provide a compelling showing that the public interest would be served by reallocating Channel 19 from Johnstown to Jeannette. [Emphasis added.]”

Staff Ruling, slip op. At 1-2.

The determination by the Allocations Branch to utilize a “compelling showing” standard of review to judge VTG’s Petition For Rulemaking was contrary to established Commission precedent. First, as shown above, in its ATV Freeze Order, supra, the Commission stated that, if a given proposal did not otherwise fall within the “changes to existing stations” exception to the Freeze Order, nonetheless:

“The Commission will also consider waiver requests [i.e., for waiver of the freeze] on a case-by-case basis for non-commercial educational stations or for

applicants which provide compelling reasons why this freeze order not apply to their particular situations or class of stations. [Emphasis added.]”

Freeze Order, supra, slip op. at 2.

Plainly, the Commission did not establish, in its Freeze Order, that “compelling reasons” would have to be demonstrated by a proponent for a channel change for an existing station which is otherwise covered by the “changes to existing stations” exception to the freeze. Yet, even though, as shown above, the proposed reallocation of Channel 19 from Johnstown to Jeannette proposed by VTG does fall squarely within the “changes to existing stations” exception to the freeze, nonetheless, the Staff ruling in this case required that VTG demonstrate the existence of “compelling reasons” why the public interest would be served by reallocating Channel 19 from Johnstown to Jeannette. Commission precedent does not require that an existing licensee proposing a mere change in a station’s community of license must meet such a rigorous standard of review before the Commission will even solicit public comment on the licensee’s reallocation proposal in the context of a notice of proposed rulemaking. See generally, Modification of FM and TV Authorizations To Specify A New Community Of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990); Ardmore, Oklahoma and Sherman, Texas, 6 FCC Rcd 7006 (Mass Media Bureau, 1991) (Notice of Proposed Rule Making); Ardmore, Oklahoma and Sherman, Texas, 7 FCC Rcd 4846 (1992) (Report and Order; Bessemer and Tuscaloosa, Alabama, __ FCC Rcd __, FCC 96-31 (released March 8, 1996). To the contrary, where, as here, a channel allocation proposal falls squarely within the “changes to existing stations” exception to the ATV freeze, all that the proponent need show is that the public interest would be served by the proposed change in allocations. This will suffice to justify issuance of a notice of proposed rule making proposing the change in question.

In this connection, it should be noted that, in Modification of FM and TV Authorizations To Specify A New Community Of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990), (“New Community of License”) the Commission held that its policy is “to apply its channel allotment criteria in a flexible manner where circumstances permit”. 4 FCC Rcd at 4873, ¶25. See also, Revision of FM Assignment Policies And Procedures, 90 FCC 2d 88, 92 (1982); Sixth Report and Order in Docket Nos. 8736 and 8975, 41 FCC 148, 172 (1952). Yet, by demanding that VTG meet a truly rigorous “compelling showing” standard of review, the Allocations Branch in this case has taken a very inflexible, Draconian approach in refusing even to issue a notice of proposed rulemaking soliciting public comment on VTG’s proposed reallocation of Channel 19 to Jeannette. Plainly, by imposing the requirement that the proponent of a change in community of license for an existing station must make a “compelling showing” that the public interest would be served by the change, the Allocations Branch is certainly not heeding the Commission’s established policy that its allotment criteria are to be applied in a flexible manner where circumstances permit. More importantly, where, as here, the very continuation of an over-the-air broadcast television service to the public clearly hangs in the balance, one can hardly envision more compelling public interest benefits to be reaped from a proposed change in a station’s community of license.

In short, the Staff Ruling’s determination to assess VTG’s Petition For Rulemaking based on the far more rigorous “compelling reasons” standard of review was clear error and should be reversed or vacated.

C. Reallocation Of Channel 19 From Johnstown To Jeannette, Pennsylvania, Would Result In A Preferential Arrangement Of Television Channel Allotments In the Area, Thereby Serving The Paramount Public Interest

In Modification Of FM and TV Authorizations To Specify A New Community Of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990), the Commission adopted Section 1.420(i) of the Commission's Rules to allow for licensees of TV and FM broadcast stations to request a new community of license in channel allotment rulemaking proceedings without subjecting the licensee or permittee to the risk of losing its authorization to competing applicants. In its Report and Order in New Community of License, the Commission stated that, in community of license channel changes for existing licensees, it would compare the proposed allotment plan to the existing state of allotments for the communities involved and that if adoption of the proposed allotment plan would result in a preferential arrangement of allotment, it would adopt the proposed changes in the Table of Allotments. 4 FCC Rcd at 4873. Moreover, the Commission concluded, in that decision, that "the best way to ensure a preferential arrangement of allotments is to apply the relevant FM or TV allotment priorities." Id. In this specific connection, the Commission noted that its policy was to apply the allotment criteria "in a flexible manner where circumstances warrant". Id.

The television allotment priorities are the following: (1) to provide at least one television service to all parts of the United States, (2) to provide each community with at least one television broadcast station, (3) to provide a choice of at least two television services to all parts of the United States, (4) to provide each community with at least two television broadcast stations, and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from other stations located in other communities. Sixth Report and Order in Docket Nos. 8736, and 8975,

41 FCC 148, 167 (1952). In its Report and Order in New Community of License , 4 FCC Rcd 4870 (1989), the Commission stated as follows:

“We have generally been willing to apply the television priorities in a more liberal fashion than the FM priorities due to the recognition that television is a more regional service. See, e.g., Cleveland Television Corp., 91 FCC 2d 1129 (Rev. Bd. 1982), aff’d 732 F.2d 962 (D.C. Cir. 1984)”.

4 FCC Rcd at 4876 n. 8.

In this case, the Commission’s television allotment priorities favor reallocation of Channel 19 from Johnstown to Jeannette, Pennsylvania. As was shown in VTG’s Petition For Rulemaking, the City of Jeannette, which is the largest incorporated city within Westmoreland County with a population of 11,221 persons, according to 1990 U.S. Census data, is severely underserved by broadcast media. No television channels are presently allotted to Jeannette, and the only radio station licensed to Jeannette is WBCW(AM), a news and talk station operating with 1,000 Watts daytime and 250 Watts nighttime, according to the 1996 Broadcasting and Cable Yearbook. Id. At B-357. By contrast, Johnstown, Pennsylvania, which has a population of only 28,134 persons, according to 1990 U.S. Census data -- i.e., a population which is only 2-1/1 times as large as that of Jeannette with only 16, 913 more persons -- has three licensed television stations. As shown in VTG’s Petition For Rulemaking, in addition to WTWB-TV, Channel 19, two VHF television stations are licensed to Johnstown (WJAC-TV, Channel 6, and WWCP-TV, Channel 8). Moreover, there is an unoccupied non-commercial educational television assignment on Channel 28 in Johnstown, and there is presently a construction permit issued for a new Low Power Television Station W35AZ, Channel 35, in Johnstown.⁷ As shown

⁷ In addition, in its Petition For Rulemaking, VTG demonstrated that seven radio broadcast stations are licensed to Johnstown, whereas only one radio station (an AM station) is
(continued...)

in VTG's Petition For Rulemaking, the Johnstown-Altoona, Pennsylvania television market, with five commercial television stations licensed to that market, is an already "over-televisioned" market, thereby making it very difficult for UHF Television Station WTWB(TV) to survive as a viable over-the-air television broadcast service unless the station is capable of being qualified for "must-carry" status on cable systems throughout the area, including cable systems in those counties within the Pittsburgh ADI. As shown above, if the VTG proposal to change WTWB-TV's community of license to Jeannette is granted, the station will be qualified for must-carry status within the Pittsburgh ADI.

In short, allotment of Channel 19 to Jeannette would satisfy Priority No. 2 of the above-cited television allotment priorities (i.e., to provide each community with at least one television broadcast station). By contrast, allotment of Channel 19 to Johnstown satisfies none of the five television allotment priorities other than Priority No. 5, since the population of Johnstown is 16,913 persons larger than that of Jeannette.

Although Jeannette is located within the Pittsburgh Urbanized Area, whereas Johnstown is not, nonetheless, for the reasons set forth below, the City of Jeannette is entitled to a preference as a first local service, and, accordingly, the reallocation of Channel 19 from Johnstown to Jeannette would therefore be a preferential arrangement of allotments and consistent with the Sixth Report and Order in Docket Nos. 8736 and 8975, supra.

In its Memorandum Opinion and Order On Reconsideration in New Community of License, 5 FCC Rcd 7094 (1990), the commission stated that reallocation proposals seeking a first local service preference for a community in an Urbanized Area would be considered in

⁷ (...continued)
licensed to Jeannette.

accordance with the criteria set forth in RKO General (KFRC), 5 FCC Rcd 3222 (1990); and Faye and Richard Tuck, Inc. 3 FCC Rcd 5374 (1988). See 5 FCC Rcd at 7097 and n. 14. In this regard, the Commission stated that, consistent with such precedent, it would preliminarily rely on three criteria to determine if a suburban community should be denied a first local service preference:

“We rely primarily on three criteria to determine if a [first local service] preference is unwarranted. First, we examine ‘signal population coverage’, or, in other words, the degree to which the proposed station could provide service not only to the suburban community but to the adjacent metropolis. Second, we examine the size of the suburban community relative to the adjacent city, its proximity to the city, and whether the suburban community is within the Urbanized Area of the city. Third, we examine interdependence of the suburban community with the central city, looking at a wide range of evidence concerning work patterns, media services, opinions of suburban residents, community institution and community services. See 5 FCC Rcd at 3223. If a suburban station could provide service to the metropolis, and if the suburban community is relatively small, is within the Urbanized Area and exhibits a high degree of interdependence with the metropolis, we are generally disinclined to grant a first local service preference to the suburban community proposal.”

Id., 5 FCC Rcd at 7099 n. 14.

In Bessemer and Tuscaloosa, Alabama, ____ FCC Rcd ____, FCC 96-31 (released March 8, 1996), the Commission held that, where, as here, a television licensee proposes to change community of license but does not propose to relocate or modify the technical facilities of the television station, the first of the three criteria described above (i.e., “signal population coverage”) need not be considered. Nonetheless, it is significant to note that, here, WTWB-TV, operating with the technical facilities authorized in BMPCT-960119KF, will not place a city-grade signal or a Grade A signal over Pittsburgh, and, indeed, will not place an actual Grade B signal over Pittsburgh, even though the station would theoretically be predicted to place a Grade B signal over Pittsburgh. See Exhibit 1, infra (Declaration of Lawrence H. Rogow) and

Attachment 1 thereto (Engineering Statement of Donald S. Wilson). Moreover, as shown in Mr. Rogow's Declaration and in Mr. Wilson's Engineering Statement, pragmatically, there is no viable means by which the WTWB-TV transmitter site could be located closer to Pittsburgh while still assuring that the station would provide a city-grade signal to Jeannette. This is hardly surprising given the fact that the distance between the WTWB-TV transmitter site and the Pittsburgh reference point is 49.3 miles (79.4 km). Thus, it is clear that WTWB-TV, operating as proposed, with Jeannette as its community of license and at the authorized transmitter site, would not be able to provide service, including city-grade service, to both Jeannette and to Pittsburgh.

In Bessemer and Tuscaloosa, Alabama, supra, the Commission held that the second of the third RKO and Tuck criteria⁸ need not be considered where the population of the purported "suburban community" is "significant". Id., slip op. At 2. Here, the population of Jeannette is also properly deemed to be significant -- i.e., 11,221 persons, based on 1990 U.S. Census data. Hence, consistent with precedent in Bessemer and Tuscaloosa, Alabama, the second of the three RKO and Tuck criteria need not be considered. Nonetheless, it should be noted that the City of Jeannette, Pennsylvania, is located approximately 34 miles from Pittsburgh -- a distance more than twice the 15-mile distance between Bessemer and Birmingham, Alabama at issue in Bessemer and Tuscaloosa, Alabama, supra. Yet, in the latter case, the Commission did not view the very close proximity of Bessemer to Birmingham as a decisional factor in determining whether to reallocate Channel 17 from Tuscaloosa to Bessemer.

⁸ I.e., size of the suburban community relative to the adjacent city and its proximity to the city, and whether the suburban community is within the Urbanized Area of the city.

Importantly, there is no “interdependence” between the City of Jeannette and Pittsburgh, under the third of the three RKO and Tuck criteria. In this regard, the Commission has developed eight factors which it deems relevant to this “interdependence” determination:

1. Whether the smaller community has its own commercial establishments, health facilities and transportation systems;
2. Whether the smaller community has its own newspaper or other media that covers the community’s local needs and interests;
3. Whether the smaller community has its own local government and elected officials;
4. The extent to which the smaller community relies on its own institutions rather than on the larger metropolis for various municipal services such as police, fire protection, schools and libraries;
5. Whether the smaller community has its own zip code or its own telephone director provided by the local telephone company;
6. The extent to which the smaller community and the central city are part of the same advertising market;
7. Whether community leaders and residents in the smaller community perceive that community as being a substantial, distinct and separate community from the larger metropolis, rather than as a mere appendage to an integral part of the larger metropolis; and
8. The extent to which residents of the smaller community work in the community itself rather than in the larger metropolis.

See, Bessemer and Tuscaloosa, Alabama, supra, slip op. at 2, ¶6; Clovis and Madera, California, _____ FCC Rcd _____, DA 96-575 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, released April 29, 1996). When these criteria are assessed, it is clear that the City of Jeannette, Pennsylvania is not “interdependent” with and Pittsburgh, which is located approximately 34 miles away.